licensed to be configured. The Commission should allow some reasonable period, perhaps 90 days after closing, for the assignee to more closely inspect the acquired facilities and verify compliance. The Commission should also require the assignor to make available to the assignee reliable station files so that the assignee may verify how the station was licensed to be configured.

Section 22.142 - Commencement of Service

26. The Commission proposes that failure to build a station during the construction period results in the automatic cancellation of the authorization, without further action by the Commission. The proposed Rule also indicates that the notification of construction "must be mailed no later than 15 days after service begins."

Comment:

27. The Commission should clarify that the Form 489 notification of construction may not only be mailed within 15 days after service begins but may also be filed by the licensee and/or counsel with the Commission during this time in a manner other than by mailing. The 15-day period is commendable because it will allow prompt commencement of service to the public without delays created by the Commission's present unwieldy filing procedure, which has long been in need of change. However, the proposed clarification is necessary because many licensees file these notifications through counsel or by using delivery services other than the

United States mail. The Commission should also clarify that the Form 489 notification may be submitted up to 15 days after the construction completion deadline, so long as the licensee constructed the authorized facility on or before the last day of the permitted construction period.

Sections 22.144 and 22.145 - Termination and Renewal Application Procedures

28. The Commission's proposal is to eliminate the current right to seek reinstatement of an expired authorization within 30 days following expiration (currently Sections 22.43 and 22.44).

Comment:

29. The Commission does not provide its reasoning for this harsh approach and none is apparent. Radiofone believes that the 30-day reinstatement provision should be retained because it allows for the correction of inadvertent oversights during the construction and/or renewal process. This flexibility is especially important for larger carriers that have many call signs. There is always the danger, despite best efforts, that some Form 489 notifications may be briefly overlooked, or some call signs may inadvertently be left out of a renewal application, especially where the station may have been acquired (along with several others) from another carrier. Elimination of the reinstatement right only increases the risk that a license will inadvertently lapse, thereby creating the possibility that a third party will file for the licensed frequency and possibly disrupt an essential

communication service to the public.

Section 22.167 - Applications for Assigned but Unused Channels

30. This new rule would establish a "finders preference program" for Part 22 licensees. The program would allow carriers to identify stations that are licensed but not operating and to file an application for the unused frequency. If the Commission finds that the offending licensee has indeed let the operation lapse, the "finder" would be awarded the frequency.

Comment:

31. While the proposal has some merit in providing a procedure whereby unused frequencies may promptly be put back in service, it is potentially fraught with abuse. For that reason, the Commission should adopt safeguards to dissuade the filing of frivolous finder's preference requests that subject licensees to unnecessary investigations and expense in defending against allegations of improper operation. These safeguards could include a requirement that an unsuccessful finder's requests would result in an order that the proponent provide compensation for the licensee's cost in responding to the request. The Commission should also clarify certain aspects of the primary method of determining when a station has discontinued operation, namely, monitoring. With regard to monitoring, the Commission should clarify that persons invoking the finder's preference are not exempt from the restrictions in the Electronic Communications Privacy Act of

1986 and Section 705 of the Communications Act of 1934, as amended, on the monitoring of common carrier radio frequencies. The statutory provisions make it illegal to intercept and/or disclose common carrier radio communications. Potential finder's preference applicants should not be allowed to misconstrue the new rule as a license to ignore these statutory restrictions. In the event that a carrier wishes to monitor another licensee in a manner that does not violate the statutory restrictions by, e.g., utilizing a spectrum analyzer so that any communications cannot be overheard, the Commission should require that the finder's preference proponent demonstrate that monitoring was conducted continuously for a sufficient period of time, such as 90 days, to assure that the station indeed is not operating.

Section 22.317 - Discontinuance of Station Operation

32. Currently, Section 22.303 provides that a station has permanently discontinued operation (with the attendant cancellation of its authorization) if the station "has not operated" for 90 continuous days or more. Proposed Section 22.317 would provide that a station permanently discontinues operation if it "has not provided service to the public for 0 continuous days." This change would appear to require that stations not only be capable of operating and providing service to the public upon request but instead must actually have at least one customer using the station.

Comment:

33. Radiofone opposes the change in wording because it would be unduly burdensome to licensees placing new stations in operation; and that consideration is not outweighed by the fact that it might discourage or eliminate frequency warehousing in a few instances. When a station is initially activated, it may be several months before customers are brought on board for the new service. Under the new rule, carriers would risk investing in the construction of a new station only to realize no return on that investment when the license cancels because customers cannot initially be found for the service. This scenario would be exacerbated for carriers attempting to establish a wide-area system in a new market area. Initially, the new service may not be marketable during the time period when only a few locations are authorized. Moreover, the carrier may not wish to place local-only paging customers on the system if it is to be used as part of a wide-area system. However, by the time a substantial number of facilities are authorized and made operational, more than 90 days may have passed without service to customers on the limited system initially constructed, thereby causing the automatic cancellation of those licenses.

34. Likewise, a carrier may wish to utilize some of its existing frequencies to try new services, as permitted under the flexible frequency allocation scheme adopted in CC Docket No. 87-120. For example, when an IMTS channel is converted for use as a "talk back" paging operation, 90 days may pass

before this conversion may be made and the new service marketed to the point where customers are actually receiving service. Implementation of the proposed rule would punish such experimentation by putting the license unnecessarily at risk.

35. Moreover, the whole concept of an automatic license termination after a prescribed period of time, i.e., without affording the licensee an opportunity to be heard on whether such termination is in the public interest, runs counter to the intent of Congress in adopting Section 312 of the Communications Act. Section 312 (c) prohibits automatic license terminations and instead requires the Commission to issue a show-cause order and to afford the licensee the right to a hearing before a license may be revoked. And Section 312 (d) places the burden on the Commission, rather than the licensee, to show that the license termination is in the public interest. Accordingly, Radiofone submits that automatic license terminations, i.e., without complying with Section 312 of the Act, are not likely to the test of judicial review.

Section 22.325 - Control Points

36. The proposed rule would require that each station have at least one control point and a person on duty in charge of station operation who would be available to turn off the transmitters. Since transmitters generally operate continuously, the proposed rule could be interpreted as

requiring the operator to be on duty at the control point 24 hours a day.

Comment:

37. The Commission should clarify that, while each licensee must have a person available at all times to turn off transmitters in the event of an emergency, the station's control point would not have to have be staffed by an operator on duty 24 hours a day.

Section 22.352 - Protection from Interference

38. The proposed rule would provide that, even if a station is operating in accordance with the Commission's rules and its license, the Commission may require modifications to the station if it is determined that the station is causing interference. The rule also defines situations in which no interference protection is afforded. Among these situations is interference to base station receivers from base station transmitters. This is the classic interference situation which the Commission's rules are designed to protect against. Section 22.100 presently provides that, in case of base-to-base interference between properly operated stations, the Commission may order changes in equipment or operation, as necessary, to eliminate the interference, after giving the involved licensees notice and an opportunity for hearing. The new rule not only appears to strip licensees of this notice and hearing right but would also appear to do away with the previous protection against base-to-base interference.

Comment:

39. The proposal by which the Commission could order modification of a license in the event the license is causing interference is legally unsustainable, without provision for notice and opportunity for hearing, because it is in direct contravention to Sections 312 (a) and 316 of the Communications Act of 1934, as amended, which require the Commission to afford licensees due process before revoking or modifying a station license. Such due process requires notice to the licensee and the opportunity for a hearing. Implementation of the proposed rule would allow the Commission to modify a station license during its term seemingly without first instituting a show cause proceeding.

40. The proposal is commendable (if it is modified to provide for due process) because it would provide a mechanism by which the Commission could eliminate interference to an existing license caused by a newcomer. However, to avoid uncertainty and unnecessary litigation, there would need to be a clear definition of what constitutes interference. Also, the protection presently embodied in Section 22.100 should be retained.

Section 22.365 - Antenna Structures

41. Section 22.365 (b) restates the current requirement that licensees may enter into tower maintenance contracts, but nevertheless "continue to be responsible for the maintenance of antenna structures in regard to air and navigation safety."

Comment:

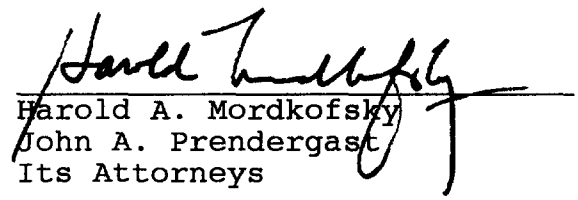
42. The Commission should clarify the maintenance contract rule. In particular, if a licensee has entered into a legally binding contract with a tower maintenance contractor or with the owner of the tower (as is generally done), and has given the contractor/owner correct, written instructions as to the requirements of the FCC for marking, lighting and maintenance of the tower, the licensee should not be responsible for performing the daily tower light inspection and associated reporting requirements. Otherwise, it will be forced to simply maintain the tower itself, despite the contract, which as a practical matter it will generally be unable to do. Even if the licensee were willing to perform such maintenance, this is not practical because tower owners generally require that the owner perform all maintenance and will not let lessees on the tower do so. While licensees can and do conduct periodic inspections to assure that tower lights are working and the painted hazard markings are clearly visible, because many transmitters are remotely located, most licensees must rely to some extent, at least, on the tower owner to insure that the tower will be properly maintained and that the FAA will be notified if lighting failures occur.

43. Moreover, the Commission should recognize that it has the right and indeed the obligation, under Section 503 (b)(5) of the Communications Act of 1934, as amended, to impose liability for monetary forfeitures on non-licensee

tower owners who do not properly maintain their towers and thereby relieve individual licensees of such forfeiture liability.

Respectfully submitted,

RADIOFONE, INC.

By: 

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